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AUTHOR Bell, Derrick A., Jr.
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ABSTRACT

Implementation of the "Brown" decision has failed to provide the equal education opportunity promise in 1954. The Supreme Court's 1955 decision, which sent school desegregation cases to the district courts, was vague and provided desegregation opponents time to organize a campaign that threatened secession and succeeded in delaying any meaningful compliance for at least 10 years. More progress might have been made if the Court had expressly deferred desegregation relief for a fairly long period. In that case, parents and community members might have been organized to effectively implement the court-ordered equal money and control mandates. Moreover, our present concerns about equal educational opportunity and fears that integrated schools provide an inferior educational quality, might have been avoided. Instead, the Court's actions have led in many instances to black parents rejecting plans calling for more racial balance in favor of policies that promise more control and more equitable distribution of educational resources. The barriers of continuing white resistance, a less than supportive Supreme Court, and the growing concentration of most poorer blacks in large urban areas, render preposterous any continuing effort to gain meaningful compliance with "Brown" through reliance on racial balance plans. The chances for further progress in the 1980s lie with those who have decided that the better route to educational quality may lie in those schools where, at least, black children and their parents are not treated as strangers. (KH)

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Panel: Quality Education: Effective Schools and Desegregation in the 1980's and '90's

HERETICAL THOUGHTS ON A SERIOUS OCCASION

Derrick Bell*

Given the personalities on this panel, one can predict a spirited debate on the degree to which a well-integrated student body contributes to quality schooling for minority children. But all will agree that implementation of the Brown decision has failed to provide the "equal educational opportunity" promised in 1954. Predictably, a major focus of this conference will be on what went wrong in the intervening decades that caused the results to fall so far short of our expectations.[1]

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* Dean, University of Oregon Law School. This contribution is based on an article, Bell, Learning from Our Losses: Is School Desegregation Still Feasible in the 1980s? 64 Phi Delta Kappan 572 (1983).

[1] A recent Joint Center for Political Studies analysis of school desegregation statistics gathered by a Congressional committee indicate that during the 1980-81 school year, almost half of the black students living in the Northeast attended schools that were from 90-100 percent minority, and 63 percent of black students around the country attended such schools. Millions of black students in the south are enrolled in desegregated schools, but much of this change had been achieved by 1972, and in recent years, the south has become slightly more segregated. In several areas, school boards are in court trying to eliminate busing and other school desegregation procedures. The Justice Department is supporting many of these attempts to undermine school desegregation plans. Orfield, Desegregation in the Public Schools, 1968-1980, in Focus, a publication of the Joint Center of Political Studies, Oct. 1982, pp. 4-5.

The facts are worst than the figures. The facts show intense segregation of blacks in areas of the Northeast, midwest, Washington D.C., and Maryland, the deep south, and California. Here large numbers of blacks live in mainly black and often poverty level neighborhoods where the need for effective education is great and the schooling available most inadequate.

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A good starting place for this inquiry is the second Brown decision.[2] There, as we all remember, the Supreme Court refused to grant the black petitioners' request that all segregated schools be enjoined immediately. The Court was understandably cautious. Strong political resistance was already evident, and neither President Eisenhower nor the Congress had indicated much enthusiasm for actions that would support or enforce the Court's order. Substituting rhetoric for firmness, the Court sent the school desegregation cases back to the district courts with vague directions to desegregate the schools "with all deliberate speed."[3]

The Court's 1955 decision has been criticized as a serious error that provided desegregation opponents time to organize a campaign that threatened secession and succeeded in delaying any meaningful compliance for at least ten years. Professor Alexander Bickel sought to defend the Court's caution as prudence. He wrote :

> "that while the vitality of constitutional principles as reflected in specific court orders ought, to be sure, not be allowed to yield simply because of disagreement with them, disagreement is legitimate and relevant and will, in our system, legitimately and inevitably cause delay in compliance with law laid down by the Supreme Court, and will indeed, if it persists and is widely enough shared, overturn such law."[4]

If nothing else, the last two decades of continued resistance to school desegregation serve to validate Professor Bickel's words as more than an abject apology for the Court's lack of courage. Still, the district courts to which the Brown was returned were located in communities in which the segregated way of life was deemed very close to godliness. And the misplaced faith the Court placed in the lower courts' ability to act with a resoluteness the Court had lacked is laid out plainly in the pages of legal history. For most of us, that history is not pleasant reading.

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[2] Brown v. Board of Education, 349 U.S. 294 (1955).

[3] Id. at 300.

[4] Bickel, The Decade of School Desegregation: Progress and Prospects, 64 Colum. L. Rev. 193, 196 (1964).

It is a question that some here will deem heretical if not seditious, but what might have been the outcome had the Court specifically delayed any order requiring the dreaded "mixing of the races" for at least five years? Suppose at the same time the Court required the total equalization of school facilities and resources. It would have seemed cruel and unprecedented at the time, but more progress might have been made in the long run had the Court expressly deferred desegregation relief for a fairly long period, while demanding the school boards to do what many of them had already begun.

We who worked so hard for school desegregation tend to dismiss as unimportant the fact that many Southern districts hoping to undermine the attack on racial segregation, had taken substantial steps to eliminate the most obvious and odious of the disparities between black schools and white schools. In the North, too, school officials hastily constructed buildings and found money for new textbooks, laboratories, libraries, and gymnasiums. The equalization programs were sufficiently far-reaching that the massive Coleman Report of 1966 failed to find the vast differences in buildings, books, and facilities between black and white schools that researchers had expected.[5]

We dismissed this tardy effort to put the equal back into "separate but equal" as too little and too late. We tend to forget that the Brown decision placed within reach the equal facilities which blacks had sought, mostly in vain, for generations. Seeking what we considered the ultimate legal right, integration, we ignored the educationally useful, equal facilities. Perhaps the schooling advantages of better facilities would have been more obvious if the Supreme Court had ordered them at once, and specifically deferred school integration.

A sad sacrifice many will say. But suppose that, in addition to requiring the equalization of all facilities and resources, the Court in 1955 had recognized that separation of students by race facilitated the real evil of segregation: white dominance over blacks in every important aspect of life. The Supreme Court might then have required that blacks be represented on school boards and other policymaking bodies in proportion equal to those of black students.

This remedy would give blacks a real potential for participation in policymaking - a prerequisite to full equality still

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[5] Equality of Educational Opportunity (Washington, D.C., U.S. Government Printing Office, 1966). Dr. Faustine C. Jones has published one of the rare comments on this phenomenon in Jones, The Inequality Controversy, J. of Negro Educ. 537-549 (Fall 1973).

unattained in many predominantly black school systems. In addition, this "equal representation" rule would have helped protect the thousands of black teachers and principals who were dismissed by school systems in the 1960s and 1970s, when school desegregation plans aimed at achieving racial balance were implemented.

Southern school districts would certainly have resisted implementation of this plan, but their defensive strategies could not have relied on the emotionally charged concerns of parents about racial mixing in the schools with the sexual overtones that sufficed to send so many otherwise sensible whites to the ramparts shouting, "Never."

School integration advocates will complain that a judicial approach that did not give priority to pupil desegregation would have played into segregationist strategy by making black parents satisfied with all-black schools. But since the first public schools opened in Boston in the 1780s, black parents have sought, not integrated schools, but schools where they could be satisfied that their children were receiving a good education.

In addition, many black parents would prefer to send their children to mainly white schools either because of convenience or out of a belief that such schools would better meet their children's educational needs. Similarly, black schools with good academic reputations would have served as a magnet for some white children just as such schools do today. Ideally, the quality of education provided black children would have improved substantially, and school integration as it took place would have occurred on far more of a peer basis than has happened in most situations.

This suggested process is far removed from that actually followed by the Court. For with the exception of striking down instances of total recalcitrance as in Little Rock in 1957,[6] the involvement of courts in the first ten years of school desegregation after Brown was generally non-productive and often counterproductive.

If civil rights groups and black parents had known in advance that the courts would not have been of much help for ten years what might they have done? Surely, there is the possibility they would have become discouraged by the delay in student desegregation and simply done nothing until the court was willing to issue such orders. More likely, they would have done what eventually needed to be done in each community where a desegregation decision was issued, and that is to organize parents and community so as to effectively implement the court-ordered equal money and control mandates. How might this have been accomplished?

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[6] Cooper v. Aaron, 358 U.S. 1 (1958).

We know that many and perhaps most black schools under the segregated system were quite bad. The unjust and racist disparities in funding almost guaranteed their inferior status. Moreover, the black schools were under the domination of white systems that not only saw no benefit in them becoming quality institutions, but also gained some perverse sense of satisfaction from the obvious inferior status that they imposed on them. Thus, principals in the black schools were appointed and retained based on their ability to keep order in the black schools. If they managed to provide a decent learning environment, there was often little objection as long as the learning process posed no overt threat to white dominance.

We also know that the fear by blacks that segregated schools would be inferior could and did become a self-fulfilling prophesy. W.E.B. DuBois explained the phenomenon well."[7] DuBois maintained that black children needed neither "separate" schools nor "integrated" schools. What they need is a good education. He noted that even then Negroes would "fight frenziedly" to end formally segregated schools, but if the schools remain all-black, their tendency is to simply accept their last argument that nothing of educational value can take place in black schools. Having lost interest, DuBois claimed that blacks "scarcely raise a finger to see that the resultant Negro schools get a fair share of the public funds so as to have adequate equipment and housing; (and) to see that real teachers are appointed."[8]

But we also know that not every black community and every black school teacher and principal succumbed to the pressure for black incompetence in their schools. In far more instances than we have records to show, individual teachers rose above the inadequate resources an the stifling atmosphere in the black schools to encourage excellence, to motivate ambition, and to teach those skills and qualities of self regard that produced scores of black success stories in the business and professional world. Some of these black schools too gained reputations for quality that were too soon forgotten in the flood of integration based hope that in 1954 seemed to sweep away all past racial experience.

It is hard for me to accept arguments that the loss of those techniques was not a devastating one. It is even harder to imagine that such loss would have occurred had the Supreme Court initiated the school desegregation process by demanding an immediate end to inequities in funding and facilities, and a proportionate role for blacks in educational policymaking.

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[7] W.E.B. DuBois, Does the Negro Need Separate Schools?, 4 J. of Negro Educ., 328 (1935).

[8] Id. at 332.

Perhaps the most distressing aspect of school desegregation progress in even those southern districts where millions of children are attending desegregated schools, is the knowledge that the presence of both races in the same schools is far from a guarantee that black children are obtaining equal access to educational opportunities. In fact, there are few of those desegregated districts in which black scholastic achievement scores are equal to the whites, and where black expulsion and disciplinary rates do not exceed by substantial margins those of whites. In addition to these grim figures are the stories of isolation, insensitivity, and outright rejection that all too many black children continue to experience in public schools that may be perfectly balanced by race, but remain dominated by whites.

Certainly, there are success stories in desegregated schools, but the number of black students who overcome the obstacles to their success represent a very small dividend indeed given the long years of investment in the school desegregation process. The number of truly desegregated schools and school systems where all black children, and not just the best and the brightest, are treated in accord with their needs is even smaller.

Had we civil rights lawyers been more attuned to the primary goal of black parents, the effective schooling of their children and less committed to the attainment of our ideal: racially integrated schools, we might have recognized earlier the obvious fact that attainment of our ideal, as difficult as that was, would not, in a society still committed to white dominance, insure that our clients and their children gained the equal educational opportunity for which they have sacrificed so much and waited so long.

But many black parents and their community leaders realized early on that there can be no effective schooling for black children without both parental involvement in the educational process, and meaningful participation in school policy making. Experience, often painful, has taught them that neither object is brought closer by enrolling their children in mainly white schools, particularly if those schools are located a long bus ride from their homes and neighborhoods.

Thus, in a number of areas, including Atlanta, St. Louis, Detroit, Milwaukee, Portland, and Dallas, blacks have rejected plans calling for more racial balance in favor of policies that in varying forms promise more control and a more equitable distribution of educational resources. In some instances, courts have recognized and encouraged educationally oriented plans. Significantly, civil rights organizations are less prone than they once were to seek court orders for racial balance relief over the objections of local parents.

Of course, the pressures of racism may well condemn any plan to educate minority children, especially the children of the poor. And surely all black parents should have the option to send their children to mainly white schools. But given the uncertain educational outcome of exercising that option almost thirty years after Brown, black parents who prefer to do now what perhaps the Supreme Court should have done in 1955, ought to be encouraged and not assailed.

At least they are trying to learn from our losses. The barriers of continuing white resistance, a less than supportive Supreme Court, and the growing concentration of most poorer blacks in large urban area, render continuing effort to gain meaningful compliance with Brown through reliance on racial balance plans, let us say it, preposterous. The chances for further progress in the 1980s lie with those who have decided that the better route to educational quality may lie in those schools where, at least, black children and their parents are not treated as strangers.